

Prison Reform Trust response to the Sentencing Council consultation on the Arson and Criminal Damage Offences Guideline – June 2018

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families.

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1. Do you agree with the proposed factors within culpability? If not, please tell us why.

The consultation states that

“...the factor of ‘Offender’s responsibility substantially reduced by mental disorder or learning disability’ has been included to ensure that sentencers focus particularly closely on the extent to which an offender’s mental disorder or learning disability reduces their culpability, so that only offenders whose responsibility for the offences may be greatly reduced because of mental disorder or learning disability are captured within lesser culpability. This factor is also caveated with the words ‘reduced weight may be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice.’ Accordingly, it may be appropriate for those offenders whose mental disorder or learning disability reduces their culpability to a lesser extent than others, or where a factor from high culpability also applies, are placed within category B, medium culpability.”

We have a number of concerns regarding how these proposed factors within culpability are currently framed:

- Sentencers need to be fully informed of any actual and underlying mental disorder, and/or learning disability if they are to consider it as a factor determining culpability. The consultation acknowledges the significant proportion of people involved in arson and criminal damage offences who have a mental disorder or learning disability. It rightly highlights the need for sentencers to take account of any underlying mental disorder or learning disability in determining culpability at step one. And yet, in the current draft guideline, the direction to sentencers to “consider whether to ask for

psychiatric reports in order to assist in the appropriate sentencing (hospital orders, or mental health treatment requirements) of certain offenders to whom this may be relevant” is only included at step two below the sentencing table. This is too late in the process if all the factors determining culpability are to be properly accounted for. The guidelines should also advocate a tiered approach for appropriate assessment. As a starting point a report should be requested from liaison and diversion services; followed by a registered medical practitioner; and finally, if required and appropriate, a psychiatric report. This would ensure that sentencers are fully informed of any mental disorder or learning disability prior to determining culpability, based on proportionate and appropriate medical assessment.

- In the draft guideline, culpability is only set at the lowest level if it is ‘substantially’ reduced by a mental disorder or learning disability. Again, in the absence of a report from an appropriate practitioner (see point 1 above), any judgement as to whether an underlying mental disorder or learning disability has contributed to a substantial reduction in culpability is likely to be highly subjective. We are concerned about sentencers being ill-equipped to determine factors for which they are not qualified, particularly in the absence of a clear direction to seek a clinical assessment. In addition, if a mental disorder or learning disability is judged to have contributed to a reduction in culpability but this reduction is not deemed to have been substantial, it is unclear how this would be accounted for in the current draft guideline. Indeed, many mental health conditions such as psychosis are associated with reckless behaviour, which could lead to the highest level of culpability being decided on in the current draft guidelines. In addition to our recommendation above, therefore, we recommended that the word “substantially” is removed from the guidelines. At the very least, an additional caveat should be added to make clear that “if an offender’s responsibility is reduced by mental disorder or learning disability then this should preclude them from the highest level of culpability except in exceptional circumstances”.
- The current draft guideline gives reduced weight to a mental health disorder in determining culpability “where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice”. The relationship between substance misuse and mental ill health is more complex than this statement suggests. There is clear evidence that misuse of drugs and alcohol is related to poor mental health. The use of the word “voluntary” fails to take into account that individuals with mental disorder can find it hard to access medical advice and maintain contact with mental health service, and this is especially so for people from black and minority ethnic communities. Individuals may self-medicate by using drugs and alcohol, and many local areas have a reduced availability of drug and alcohol services, especially for people with co-occurring mental health difficulties. We recommend that this caveat is removed from the guidelines.

4. Do you agree with the inclusion of this text within the guideline?

As outlined in our response to question 1, we recommend that the direction to sentencers to ask for appropriate medical reports should be moved to step one of the process, so that proper account can be taken of any underlying mental disorder or learning disability in determining culpability as well as in setting the appropriate sentence. In addition, the guidance should be strengthened so that there is an

expectation placed on sentencers to seek appropriate reports so they are fully informed of the factors influencing culpability as well in determining sentence.

Increasingly courts now have access to liaison and diversion services (83% population coverage in England) and criminal justice liaison services (in Wales). Services in England will reflect a common service specification, set by NHS England, which includes children and adults, and a wide range of mental health, disability, substance misuse and social vulnerabilities. Liaison and diversion and criminal justice liaison services will cover police custody and court settings. Liaison and diversion and criminal justice liaison services are staffed by qualified healthcare professionals, with access to mental health, learning disability and other expertise. Part of their role is to inform criminal justice decision making by providing information to members of the judiciary and court staff concerning the particular needs of individual defendants, ways in which they can be supported during court proceedings, and sentencing. Therefore, specific reference should be made in the guidance to the benefits of liaison and diversion services, with the expectation that sentencers will make full use of the reports provided by these services in the sentencing process.

5. Do you agree that the proposed aggravating and mitigating factors cover the most likely factors that would apply to these offences? If not, please tell us why.

In the draft guideline, 'Commission of offence whilst under the influence of alcohol or drugs' is included as an aggravating factor "as this is a relatively common feature within this type of offending, and can make the offending more serious." As outlined in our response to question 1, co-morbidity of mental health disorders and drug/alcohol addictions is extremely common amongst people who offend. Many people with mental health conditions use drugs or alcohol to help them to deal with their symptoms in the absence of receiving an effective clinical response. Therefore, we are particularly concerned that people with an underlying mental health condition who are using drugs or alcohol to cope with the impact of their symptoms may end up having this counted against them as an aggravating factor without the underlying mental disorder being taken into account. This is a particular risk at step two, given that mental disorder or learning disability is not counted as a mitigating factor (presumably due to its prominence as a factor at step one). Therefore, we recommend that this aggravating factor is removed, or at least caveated so that any underlying mental health condition and its possible link to substance misuse is taken into account.

9. Do you agree with the inclusion of this text within the guideline, and the detailed information on mental health disposals at step three?

See our answer to question 4.

We agree with the inclusion of the detailed information on mental health disposals at step three. In particular, the mental health treatment requirement has been shown to be particularly effective but is underused by sentencers. Therefore, much more could be done to encourage its take up, including by sign posting in sentencing guidelines and highlighting the current Community Sentence Treatment Requirement trial sites, recently announced by the Secretary of State for Justice.

10. Do you agree that the proposed aggravating and mitigating factors cover the most likely factors that would apply to these offences? If not, please tell us why.

See our answer to question 5.

11. Do you agree with the proposed culpability factors? If not, please tell us why.

See our answer to question 1.

15. Do you agree with the proposed culpability factors? If not, please tell us why.

See our answer to question 1.

22. Do you agree with the inclusion of this text within the guideline?

See our answer to question 4.

24. Are there any equality or diversity matters that the Council should consider for the guidelines discussed? Please provide evidence of any issues where possible.

Women who offend are more likely than men to have a mental disorder and so could be considered at increased risk of this type of offending. Below we have collated statistics on women who were sent to prison for arson which show an increase in recent years in the number of women sent to prison for arson offences.

- In 2007, 33 women were sent to prison for arson (endangering life) with 11 of those given IPPs. 17 women were sent to prison for arson (not endangering life) with 2 of those given IPPs.
- In 2008, 42 women were sent to prison for arson (endangering life) with 8 of those given IPPs. 17 women were sent to prison for arson (not endangering life) with 3 of those given IPPs. One woman was sent to prison for Criminal Damage (Endangering Life) and she was given an IPP.
- In 2009, 43 women were sent to prison for arson (endangering life) with 3 of those given IPPs
- In 2010, 42 women were sent to prison for arson (endangering life) with 2 of those given IPPs
- In 2011, 76 women were sent to prison for arson (endangering life) with 3 of those given IPPs
- In 2012, 67 women were sent to prison for arson (endangering life) with 6 of those given IPPs. 20 women were sent to prison for arson (not endangering life) with one woman given an IPP sentence. 7 women were sent to prison for Other Criminal Damage, with one woman given an IPP sentence.

IPPs were abolished in 2012.

